

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

THEODORE TRAPP,

Plaintiff,

v.

BIG POPPA'S, LLC, *et al.*,

Defendants.

Case No. 2:09-cv-00995-LDG (PAL)

ORDER

The plaintiff, Theodore Trapp, filed the present putative class action suit against numerous adult nightclub owners. Trapp asserts civil claims for violating NRS §§ 207.400(1)(a)(2), (b), (c), (d), (h) (Nevada's Racketeer Influenced and Corrupt Organizations Act, or Nevada RICO) and NRS §41.600 (Nevada Deceptive Trade Practices Act). A number of the defendant adult nightclub owners now move or join in motions to dismiss or, at a minimum, to require a more definitive statement (Docket ## 77, 175, 221, 235, 236, 243). Trapp opposes the motions. Having considered the complaint and the arguments of the parties, the Court will dismiss Trapp's lawsuit claims against the moving defendants and those defendants who have joined the motions to dismiss.

1 Motion to Dismiss

2 The defendants' motions to dismiss, brought pursuant to Fed. R. Civ. P. 12(b)(6),
3 challenge whether the plaintiff's complaint states "a claim upon which relief can be
4 granted." In ruling upon these motions, the court is governed by the relaxed requirement of
5 Rule 8(a)(2) that the complaint need contain only "a short and plain statement of the claim
6 showing that the pleader is entitled to relief." As summarized by the Supreme Court, a
7 plaintiff must allege sufficient factual matter, accepted as true, "to state a claim to relief that
8 is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
9 Nevertheless, while a complaint "does not need detailed factual allegations, a plaintiff's
10 obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels
11 and conclusions, and a formulaic recitation of the elements of a cause of action will not do."
12 *Id.*, at 555 (citations omitted). In deciding whether the factual allegations state a claim, the
13 court accepts those allegations as true, as "Rule 12(b)(6) does not countenance . . .
14 dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v.*
15 *Williams*, 490 U.S. 319, 327 (1989). Further, the court "construe[s] the pleadings in the
16 light most favorable to the nonmoving party." *Outdoor Media Group, Inc. v. City of*
17 *Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007).

18 However, bare, conclusory allegations, including legal allegations couched as
19 factual, are not entitled to be assumed to be true. *Twombly*, 550 U.S. at 555. "[T]he tenet
20 that a court must accept as true all of the allegations contained in a complaint is
21 inapplicable to legal conclusions." *Ashcroft v. Iqbal* 556 U.S. ___, 129 S.Ct. 1937, 1949
22 (2009). "While legal conclusions can provide the framework of a complaint, they must be
23 supported by factual allegations." *Id.*, at 1950. Thus, this court considers the conclusory
24 statements in a complaint pursuant to their factual context.

1 To be plausible on its face, a claim must be more than merely possible or
2 conceivable. “[W]here the well-pleaded facts do not permit the court to infer more than the
3 mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the
4 pleader is entitled to relief.’” *Id.*, (citing Fed. R. Civ. Proc. 8(a)(2)). Rather, the factual
5 allegations must push the claim “across the line from conceivable to plausible.” *Twombly*.
6 550 U.S. at 570. Thus, allegations that are consistent with a claim, but that are more likely
7 explained by lawful behavior, do not plausibly establish a claim. *Id.*, at 567.

8 To the extent that Trapp must allege fraud or mistake to state a claim, he “must
9 state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. Pro.
10 9(b). A plaintiff must plead the predicate criminal acts underlying a civil Nevada RICO
11 claim with the specificity appropriate to a criminal indictment. *Cummings v. Charter Hosp.*,
12 111 Nev. 639, 646 (1995). The predicate acts must be pled with facts that are sufficiently
13 plain, concise, and definite as to place the defendant on notice of the charged conduct. *Id.*
14 Accordingly, the plaintiff has the burden of alleging when, where, and how the underlying
15 criminal acts occurred. *Id.*

16 Summary of Trapp’s Allegations Regarding Conduct Involving Him

17 On January 17, 2009, Trapp got into a taxi and told the driver that he wanted to go
18 to Play it Again Sam, an adult nightclub.¹ After Trapp told the driver of his intended
19 destination, the driver told Trapp that there are better clubs, the girls are better at other
20 clubs, and that the requested club was “kinda sketchy.” Based upon the driver’s
21 statements, Trapp allowed the driver to take him to Spearmint Rhino.

22 Trapp believes Spearmint Rhino paid the driver a “significant kickback for diverting
23 [Trapp] from Play it Again Sam.”

24
25
26 ¹ Though Trapp has not expressly alleged that Play it Again Sam is an adult
nightclub, the Court has assumed this from the context of the entire complaint.

1 The driver did not inform Trapp “that the driver would receive a kickback for diverting
2 [Trapp] from Play it Again Sam to Defendant SPEARMINT RHINO,” or that the diversion of
3 customers to certain defendant adult nightclubs was a pervasive practice.

4 Construed broadly, Trapp alleges that Spearmint Rhino charges an increased cover
5 charge that is often applied toward the payment of money to the driver.

6 Summary of Trapp’s Allegations Regarding Defendants’ Conduct to Others

7 Trapp further, and generally, alleges the defendant adult nightclubs operate off of
8 the Las Vegas Strip. Individuals who wish to visit a defendant adult nightclub and who do
9 not have their own transportation must use a taxi.

10 Taxi drivers have an incentive to deliver customers to those defendant adult
11 nightclubs that “currently providing the largest illegal kickbacks” to the drivers. Taxi drivers
12 often attempt to divert customers from a requested destination to those defendant adult
13 nightclubs “that provide a [sic] largest kickbacks.” The drivers attempt this diversion by
14 falsely representing the quality of services and amenities at certain adult nightclubs and
15 falsely representing the business status of certain adult nightclubs.

16 Some drivers refuse to drop off a customer at a location that does not pay money to
17 the drivers.

18 Drivers receive an estimated \$100 for each customer “diverted” to a defendant.

19 The defendants recoup the money they pay as kickbacks to drivers from cover
20 charges, by selling customers lower quality liquor which they have represented to be a
21 “high quality, expensive liquor,” by “watering down” the liquor and other drinks, by falsely
22 stating amounts owed by customers, and by using force or threat of force to make
23 customers turn over money.

24 Pertinent Nevada RICO Allegations

25 The defendants’ predicate acts of racketeering activity were “multiple acts of taking
26 property from another under circumstances not amounting to robbery,” in violation of NRS

1 §205.380. More specifically, the defendants “obtained additional admission from their
2 customers” which was paid to drivers as kickbacks to divert customers. The defendants
3 falsely represented this as a cover charge or an admission fee.

4 Trapp (and others) suffered substantial monetary losses as a result of the
5 defendants’ acts of obtaining money under false pretenses.

6 Analysis - Nevada RICO Claims

7 Trapp’s Nevada RICO claims fail because, quite simply, he has failed to sufficiently
8 allege facts to support any element of a civil Nevada RICO claim.

9 Any person injured as a result of racketeering activity may bring a civil action. NRS
10 §207.470. “‘Racketeering activity’ means engaging in at least two crimes related to
11 racketeering....” NRS §207.390. Pursuant to §207.360(9), taking property from another
12 under circumstances not amounting to robbery is a crime related to racketeering. Pursuant
13 to §207.360(26), obtaining possession of money or property valued at \$250 or more by
14 means of false pretenses is a crime related to racketeering. As noted previously, Trapp
15 must plead these predicate criminal acts with the specificity appropriate to a criminal
16 indictment. He must allege facts as to when, where, and how the underlying criminal acts
17 occurred. Trapp does not offer any argument that, in pleading the predicate criminal acts
18 requisite to his civil Nevada RICO claims, this is not the appropriate standard to determine
19 whether he has sufficiently pled the facts pertaining to the predicate criminal acts. Trapp
20 has not met this burden for even a single predicate criminal act as to any defendant adult
21 nightclub. While his opposition generally asserts he has alleged when, where and how, he
22 does not identify any allegations of fact within his complaint that support this assertion.
23 Generally alleging that the defendant adult nightclubs charged customers an admission fee
24 and then paid a portion of that admission fee to taxi drivers, and generally asserting that
25 this happened thousands of times does not meet the requirement of alleging the criminal
26 act with the specificity appropriate to a criminal indictment. Trapp’s other general

1 allegations, such as the allegations that defendant adult nightclubs watered down the
2 liquor, or charged for services or products that were never ordered or received, are similarly
3 deficient.

4 Trapp has not alleged sufficient facts to permit an inference that, in charging an
5 admission fee and paying taxi drivers, any of the defendant adult nightclubs committed a
6 crime. Trapp concedes that it is not illegal for an adult nightclub to either charge an
7 admission fee or to pay a cab driver. He further concedes that he is not complaining that
8 he was charged an admission fee. Trapp argues, however, that the legality of charging
9 admission and paying taxi drivers is irrelevant if these acts are accomplished through
10 fraudulent or illegal means. Rather, he asserts that he is complaining because (a) an
11 admission fee was wrongfully obtained from him through the execution of a fraudulent
12 scheme, and (b) the admission fee was substantially more than the regular entrance fee.
13 Both arguments fail, under the weight of Trapp's own allegations and concessions, to
14 establish that he adequately alleged facts supporting an inference that the defendant
15 nightclubs committed a criminal act. As both charging an admission fee and paying a taxi
16 driver are lawful, Trapp must allege facts from which an inference can be drawn that the
17 otherwise lawful acts of charging an admission fee and paying taxi drivers become part of a
18 criminal act. Alleging that adult nightclubs spend the proceeds of admission fees to pay
19 taxi drivers is insufficient, as it is not a crime to spend lawfully obtained money on a lawful
20 expense. Alleging that the adult nightclubs increased their admission fees to cover the
21 payments to taxi drivers is insufficient as it is not a crime to increase the price charged for a
22 service or product, so long as the service or product is delivered. Whether an adult
23 nightclub elects to charge an admission fee of a few dollars or a few hundred dollars, the
24 relevant query is not how the adult nightclub spent the proceeds, but whether the adult
25 nightclub then admitted the customer. Alleging that the adult nightclubs did not disclose
26 that the proceeds of the increased admission fees would be used to pay taxi drivers is

1 insufficient. Trapp has not offered any authority suggesting that adult nightclubs (or any
2 other business) have a duty to disclose their lawful expenses to each customer or to any
3 customer.²

4 Simply alleging that adult nightclubs wrongfully obtained the admission fees is
5 insufficient as the allegation is conclusory. Trapp has the burden of alleging facts
6 permitting the inference that the adult nightclubs wrongfully obtained the admission fees.
7 Trapp does not identify any allegation in his complaint concerning any act by adult
8 nightclubs in collecting the increased admission fee that is wrongful. While Trapp suggests
9 in his opposition that the fees are “extracted,” he fails to identify any allegation of fact in his
10 complaint that supports this assertion.

11 The Court acknowledges Trapp’s argument and allegations that, because the
12 defendant adult nightclubs pay money to taxi drivers, taxi drivers have an incentive to divert
13 customers to those defendant adult nightclubs that pay taxi drivers, and in particular those
14 who pay the most money to taxi drivers. As a result of this incentive, some taxi drivers
15 engage in efforts to deliver customers to an adult nightclub other than originally intended by
16 the customer. For purposes of this motion, the Court assumes that the efforts of some taxi
17 drivers, including the taxi driver that delivered Trapp to the Spearmint Rhino, constitute an
18 unlawful diversion of the customer.³ Such allegations, however, do not render criminal or

20 ² Trapp asserts that the adult nightclubs do not report the receipt of admission
21 fees to the IRS, but offers no explanation as to how this allegation constitutes an element
of the predicate criminal acts underlying his Nevada RICO claims.

22 The Court would further note that its analysis would remain the same, even if the
23 defendant adult nightclubs’ payments to drivers violated a local ordinance or state statute.
24 Trapp’s arguments fail because he has not offered any authority establishing that a
business commits the crime of taking property from another under circumstances not
amounting to robbery or by false pretenses by charging an admission fee, admitting the
customer and then spending the proceeds in ways unexpected by the customer.

25 ³ The Court has assumed, for purposes of this motion, that the taxi driver’s
26 utterance of the alleged statements to Trapp, which caused Trapp to allow the taxi driver to
deliver him to the Spearmint Rhino rather than Play it Again Sam, constituted an unlawful
diversion.

1 unlawful the adult nightclubs' acts of charging admission fees or paying to taxi drivers.
2 That some taxi drivers engage in unlawful conduct to obtain a lawful payment from an adult
3 nightclub does not cause the adult nightclub's payment to be unlawful. The Court must
4 also recognize Trapp's allegations some taxi drivers will not deliver to adult nightclubs that
5 do not pay taxi drivers, or whose payments are unsatisfactory. That is, Trapp's own
6 allegations require the conclusion that it is equally plausible that an adult nightclub must
7 pay a satisfactory amount to taxi drivers to ensure that taxi drivers will not have an
8 incentive to divert customers to other adult nightclubs.

9 Trapp's allegations that the adult nightclubs "shake down" customers and force them
10 to turn over money and property is insufficient. He does not allege facts indicating a single
11 incident that occurred to him, nor does he allege facts—the when, where and how—that
12 would support a criminal indictment as to any incident involving a different victim.

13 For the same reasons, Trapp's Deceptive Trade Practices claim fails.

14 The Court will dismiss the complaint against the moving defendants without
15 prejudice.

16 Therefore, for good cause shown,

17 THE COURT **ORDERS** that the Motions to Dismiss (## 77, 175, 235, 243, Joinders
18 at ## 221, 236) are GRANTED. The Complaint is DISMISSED without prejudice as to
19 Defendants Deja Vu Showgirls of Las Vegas, LLT, Little Darlings of Las Vegas, LLC, Las
20 Vegas Entertainment LLC d/b/a Larry Flynt's Hustler Club, D.2801 Westwood, Inc., d/b/a
21 Treasures, Big Poppa's LLC, O.G. Eliades, A.D., LLC, RCI Entertainment (Las Vegas), Inc.
22 d/b/a Rick's Cabaret, Shac, LLC, and K-Kel, Inc. d/b/a Spearmint Rhino.

23 DATED this 25 day of May, 2011.

24
25 
26 Lloyd D. George
United States District Judge